93-314

Supreme Court, U.S.
FILED
AUG 12 1993
OFFICE OF THE CLERK

No. _____

In The
Supreme Court Of The United States

October Term, 1993

RONALD O. PELLETIER,
Petitioner

v.

GARY D. ZWEIFEL,
Respondent

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED FOR REVIEW

I. Under what circumstances should a Court of Appeals reverse a district court's determination that imposition of Rule 11 sanctions is not warranted?

A. Should this Court resolve a conflict among the Circuits concerning the purpose of Rule 11 and decide whether the purpose of sanctions is to compensate a prevailing party (as the Court of Appeals held in this case) or, rather, whether sanctions are intended to deter conduct violative of the Rule?

B. Should a Court of Appeals determine the nature and scope of an appropriate Rule 11 sanction without a consideration of what sanction is the minimum sanction necessary to deter violative conduct?

C. Should a Court of Appeals re-examine and re-determine factual findings of a district court which led the district court to decline to impose Rule 11 sanctions?

D. Does the process that is due a person before Rule 11 sanctions are imposed include the right to an evidentiary hearing in the Court making the decision at which it can be determined whether an improper purpose was present and what sanction is the minimum necessary to deter conduct which is violative of the Rule?

E. Does the process that is due a person before financially ruinous Rule 11 sanctions are imposed include a hearing to consider the person's ability to pay?

II. Should Rule 11 sanctions be imposed when a Court of Appeals affirms a grant of summary judgment based on adversely-drawn inferences concerning issues which were neither raised nor briefed on appeal?

III. Should Rule 11 sanctions be imposed when a Court of Appeals affirms a grant of summary judgment based on adversely-drawn inferences concerning issues which were neither raised nor briefed on appeal?

IV. Should Rule 11 be used to deter attorneys from filing lawsuits under a broad, ambiguous, judicially disfavored statute (the RICO Act)?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	Ronald O. Pelletier
Respondent:	Gary D. Zweifel
Other entities with an interest:	Herbert P. Schlanger Lokey & Bowden Shand, Morahan & Company, Inc. General Accident Ins. Co. of America, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION OF THIS COURT	1
RULE PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF THE WRIT	5
1. The purpose of Rule 11 sanctions is not the compensation of parties	5
a. A Court of Appeals should not determine the nature and scope of an appropriate Rule 11 sanction with out a consideration of what sanction is the minimum sanction necessary to deter violative conduct.	6
b. A Court of Appeals should not re-examine and re-determine factual findings of a district court which led the district court to decline to impose Rule 11 sanctions.	7
c. The process that is due a person before massive Rule 11 sanctions are imposed includes the right to an evidentiary hearing in the Court making the decision.	9
d. The process that is due a person before financially ruinous Rule 11 sanctions are imposed includes a	

hearing to consider the person's ability to pay. 11

2. The panel members should have recused themselves 12

3. Rule 11 sanctions should not be imposed when a Court of Appeals affirms a grant of summary judgment based on adversely-drawn inferences while deciding issues which were neither raised nor briefed on appeal. 13

   a. Summary judgment was improperly granted to the defendant. 13

   b. The Court of Appeals should not have determined facts and decided issues of law which were neither briefed nor argued on appeal and should not have imposed sanctions based on a constricted reading of the RICO Act. 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14, 15

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14

Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990) 6 - 9

Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191 (3rd Cir., 1988) 6, 7, 12

Donaldson v. Clark, 819 F.2d 1551 (11 Cir., 1987)(en banc) 12

H.J., Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893 (1989) 20

Haines v. Liggett Group, Inc., 975 F.2d 81 (3rd Cir., 1992) 12, 13

In re Kunstler, 914 F.2d 505 (4th Cir., 1990) 6, 10, 11

In re Yagman, 796 F.2d 1165 (9th Cir., 1986) 12

Liniado v. Alexander, ___ Ga.App. ___ (1991) 14

Pelletier v. Lokey & Bowden, 192 Ga.App. 470, 385 S.E.2d 90 (1989) 4, 17

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir., 1991) 3, 4, 5, 16

TABLE OF AUTHORITIES (Continued)

Page

Stewart v. American Int'l Oil & Gas Co.,
845 F.2d 196 (9th Cir., 1988) 6

White v. General Motors Corp.,
908 F.2d 675 (10th Cir., 1990) 5

OPINIONS BELOW

The district court's opinions granting summary judgment to the defendant and denying imposition of Rule 11 sanctions against the plaintiff were not reported and are reproduced in the Appendix at App. 1 and 15. The Court of Appeals' opinion ordering imposition of Rule 11 sanctions is reported at 921 F.2d 1465 (11th Cir., 1991).[1] The district court's opinion imposing the sanctions directed by the Court of Appeals was not reported and is reproduced in the Appendix at App. 18. The Court of Appeals' opinion reversing the district court's determination of the amount of the sanction is reproduced in the Appendix at App. 24. The district court's order on remand is reproduced in the Appendix at App. 30.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on March 18, 1993, and a timely petition for re-hearing or re-hearing en banc was denied on May 14, 1993. This petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. §1254(1).

RULE PROVISIONS INVOLVED

Rule 11, Federal Rules of Civil Procedure

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated.... The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after

1 Because of its length, this opinion is not reproduced in the Appendix. It was reproduced in the Appendix of the petitioners' previous petition for a writ of certiorari, Case Number 91-3.

reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 56, Federal Rules of Civil Procedure

(b) For Defending Party. A party against whom a claim... is asserted ... may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

STATEMENT OF THE CASE

This case involves the summary imposition, by the Court of Appeals, of over $300,000.00 in Rule 11 sanctions, which constitutes the imposition of a financial "death penalty" on counsel.[2] The sanctions were imposed by the Court of Appeals

2. Attorney Schlanger has filed a Chapter 11 petition in bankruptcy, occasioned by the Consequences of the Court of Appeals' judgment.

in the face of the district court's denial of sanctions and without benefit of any evidentiary hearing and with no consideration of the necessity or propriety of those sanctions to deter conduct violative of Rule 11.

Pelletier initially sued Zweifel alleging, inter alia, a violation of the RICO Act. It was claimed that Zweifel had joined with his client, Culpepper, in (and had knowingly furthered) an on-going scheme fraudulently to induce investments in Culpepper's travel agency (referred to below as "BHT") with false promises of managerial changes and control.[3] Zweifel moved to dismiss the suit for failure to state a claim but his motion was, in its most significant parts, denied and the case proceeded through discovery. There were no discovery disputes of any consequence and neither party sought extra-judicial publicity.

After discovery was completed, Zweifel moved for summaryjudgment and for Rule 11 sanctions. The district court granted Zweifel summary judgment but denied the motion for sanctions, holding that although, in "plaintiff's extremely fact specific complaint" "many of the discrete facts specifically pled in the complaint are true ..., the inference sought by plaintiff... is not warranted by the evidence", Order of July 10, 1989, p.2; R.7-80-2.

Both sides appealed and the Court of Appeals affirmed the grant of summary judgment. On Mr. Zweifel's cross-appeal, however, the Court of Appeals held that the district court undertook too narrow a review and should have viewed the complaint as a whole, Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir., 1991).

In an extended and scathing opinion, after reweighing and re-characterizing the evidence in a light more favorable to Mr. Zweifel (which enabled it to reach a conclusion diametri-

3. A more detailed exposition of the facts of the underlying litigation is set out in the petition for a writ of certiorari which was filed in this Court by petitioners in 1991, Pelletier v. Zweifel, Case number 91-3.

cally opposed to the decision reached by the district court) and deciding questions of law neither briefed nor argued on appeal, the Court of Appeals reversed the denial of sanctions. It held that -- despite the voluminous evidence cited by Mr. Pelletier[4] and the denial ofZweifel's summary judgment motion by the trial court in a companion state court action based on essentially the same facts, Pelletier v. Lokey & Bowden, 192 Ga.App. 470, 385 S.E.2d 90 (1989) -- the complaint (a) was factually baseless, (b) was filed for an improper purpose, and (c) was frivolous when filed.

In its opinion, the panel roundly castigated Messrs. Pelletier and Schlanger. With no basis in the evidence, it accused them of extortion and of engaging in a "shake down", 921 F.2d at 1522. The case was remanded with directions to impose sanctions under Rule 11 against both Mr. Pelletier and Mr. Schlanger and further mandated clearly and precisely what those sanctions should be -- the amount Mr. Zweifel had paid in fees and costs:

... We accordingly remand the case for the imposition of such sanctions as will recompense Zweifel for the expenses that he incurred, including attorney's fees, in defending this suit in the district court.

921 F.2d at 1470 (emphasis supplied)

and

... [W]e direct the district court, upon receipt of our mandate, to award Zweifel a sum of money that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecut-

4. When Zweifel moved for summary judgment, Pelletier responded and included in his memorandum, R.4-53, an itemization of the evidence supporting each of plaintiff's contention and refuting defendant's contentions (pp.4-70). He further filed a 125 page Response to Defendant's Statement of Material Facts and Counter-Statement of Material Facts, R.5-54, which cited to specific evidence contradicting many of the facts relied upon by Zweifel and which also set forth, paragraph by paragraph from the complaint, the facts supporting each allegation contained in the complaint (and acknowledging where inferences were sought to be drawn). These two documents were separately bound and submitted to the Court of Appeals as a "Supplement to Required Excerpts of Record".

ing his motion for Rule 11 sanctions.

921 F.2d at 1522 (emphasis supplied)

On remand, the evidence was undisputed and the district court found that Zweifel had incurred no fees or costs. As Zweifel's counsel admitted:

> MR. BARTLETT: So, that's where we stand, and under Mr. Schlanger's theory of the case, then Mr. Zweifel has not paid anything as far as this case is concerned. So, therefore, if Mr. Schlanger is correct, Mr. Zweifel is not entitled to anything.

R.10-15 (emphasis supplied).

The district court nevertheless, in keeping with the spirit and language of the mandate, imposed a sanction of $25,000.00 against Schlanger and Pelletier.

Zweifel appealed, seeking an increase in the amount to over $300,000 to compensate his insurance carrier (not him); Pelletier and Schlanger cross-appealed to have the amount reduced to the amount Mr. Zweifel actually "incurred". The panel re-read its earlier mandate, decided that the plain meaning of the words it had used had not produced the result it desired, and directed that judgment be entered in the amount of $301,156.46, plus costs and interest.

REASONS FOR ALLOWANCE OF THE WRIT

1. The purpose of Rule 11 sanctions is not the compensation of parties (as the Court of Appeals held) but, rather, it is the deterrence of conduct violative of the Rule.

Compensation is not the appropriate measure of a proper sanction; an amount sufficient to deter conduct violative of Rule 11 is. See, e.g., White v. General Motors, 908 F.2d 675, 684-85 (10th Cir., 1990) ("[T]he primary purpose of sanctions

is to deter attorney and litigant misconduct, not to compensate the opposingparty for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice."); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3rd Cir., 1988) ("A district court's choice of deterrent is 'appropriate when it is the minimum that will serve to adequately deter the undesirable behavior.'") and the cases and authorities cited therein; In re Kunstler, 914 F.2d 505, 522 (4th Cir., 1990) ("[T]he least severe sanction adequate to serve the purposes of Rule 11 should be imposed.... It is clear that Rule 11 should not blindly be used to shift fees." [citation omitted]); Stewart v. American Int'l Oil & Gas Co., 845 F.2d 196, 201-202 (9th Cir., 1988) ("The district court considered that although the full amounts appeared to be reasonable, a lesser amount was sufficient to get the attention of Meridian and deter it from further abuses. The imposition of sanctions was well within the sound discretion of the district court.").

The Court of Appeals in this case, however, chose compensation as its measure, 921 F.2d at 1522 and slip op. at p.3, and this choice conflicts with the reading given to Rule 11 by every other Court of Appeals which has considered the issue. Certiorari should be granted to resolve this conflict among the Circuits, to insure that the scope of a sanction is reasonably related to the purpose of the Rule -- deterrence -- and to insure that the Rule is not transformed into a blanket compensatory device without regard to its purpose.

a. A Court of Appeals should not determine the nature and scope of an appropriate Rule 11 sanction without a consideration of what sanction is the minimum sanction necessary to deter violative conduct.

Since the Court of Appeals chose compensation as the measure of the sanction, it never considered (and did not permit the district court to consider) what sanction was the "minimum that will serve to adequately deter the undesirable behavior", Doering, 857 F.2d at 194. Certiorari should be

granted to ensure that the law in the Eleventh Circuit (and elsewhere) remains consistent with both the purpose of the Rule (and its focus on deterrence) and with the decisions of the other Courts of Appeal, and that Rule 11 is not converted into a fee-shifting device.

b. A Court of Appeals should not re-examine and re-determine factual findings of a district court which led the district court to decline to imposeRule 11 sanctions.

The panel's decisions in this case conflict directly with this Court's holding in Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990). Certiorari should be granted to conform the law of the Eleventh Circuit to the law as declared by this Court and by other Courts of Appeals.

This Court held, in Cooter & Gell, that there are certain matters which should be left for a district court's initial determination: (1) whether there has been a violation of Rule 11; and, if so, (2) the nature and scope of an appropriate sanction. In this case, the panel undertook to determine all of these. As this Court said:

> The issues involved in determining whether an attorney has violated Rule 11 ... involve 'fact-intensive, close calls'.... [T]hat sanctions "shall" be imposed when a violation is found does not have any bearing on how to review the question whether the attorney's conduct violated Rule 11.... The district court is best acquainted with the local bar's litigation practices and thus best suited to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of the courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and

> considered by the district court ....
>
> .... An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts nor will it clarify the underlying principles of law.
>
> Cooter & Gell, 110 S.Ct., at 2460

The value of appellate review following a district court's denial of sanctions is even more limited than it is when it reviews the grant of sanctions.

Certiorari should be granted to define the proper, broad scope of the district court's discretion to deny Rule 11 sanctions and to emphasize the restricted nature of a proper appellate review of such a determination. A district court is obviously best situated to determine when it believes that the attorneys before it have abused the litigation process. If, given its experience and caseload, a district court does not believe that such abuse has taken place and believes that no sanctions are warranted, its determination should very rarely be disturbed (as this Court, in Cooter & Gell, recognized).

It would seem that, since "the central purpose of Rule 11 is to deter baseless filings in the district court and thus ...streamline the administration and procedure of the federal courts", Cooter & Gell, 110 S.Ct., at 2454, a district court decision not to impose sanctions should almost never be reversed. The Rule was enacted as a tool for use by the district courts to enable them to deal with what they perceive as abuses within their jurisdictions. If a district court does not feel impelled in a particular circumstance to use this mechanism, the Courts of Appeals should be particularly deferential to such judgments.

Perhaps the Court of Appeals' proper role could best be

described as a shield against an over-zealous use of the Rule by the district courts, while the district court's use of the Rule is a sword to be used when the district court feels the process has been abused. The Court of Appeals should not wield the district court's sword, nor force the district court to do so. Certiorari should be granted to insure that the law reflects the proper division of responsibility between the trial and appellate courts.

c. The process that is due a person before massive Rule 11 sanctions are imposed includes the right to an evidentiary hearing in the Court making the decision.

Due process requires that the tribunal deciding whether to impose large Rule 11 sanctions hold a hearing at which it can be determined whether an improper purpose was present and, if so, what sanction is the minimum necessary to deter conduct which is violative of the Rule. This should not (and can not) be done in a factual vacuum by a panel unfamiliar with the attorney upon whom sanctions are to be imposed.

This Court has recognized this principle:

> The issues involved in determining whether an attorney has violated Rule 11 ... involve 'fact-intensive, close calls'.... The district court is best acquainted with the local bar's litigation practices and thus best suited to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of the courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court ....
>
> Cooter & Gell, 110 S.Ct., at 2460

The Fourth Circuit has taken a similar approach, articulated in In re Kunstler, 814 F.2d at 518-19:

> ... [W]e urge district courts to exercise special caution when evaluating a signer's purpose under Rule 11. When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purposes as well as failure to comply with the first two prongs of Rule 11.
>
> In re Kunstler, 914 F.2d at 520.

The Court of Appeals in this case, however, ignored this caution and found that an "improper purpose" was present without benefit of any evidence or hearing on the issue. This Court should grant certiorari to clarify the meaning of the phrase "improper purpose" and restrict its use to the proper parameters and clearly to establish the need for an evidentiary hearing in circumstances such as those present in this case.

The Court of Appeals, having determined in its opinion that there was no factual basis for the complaint, ruled that, ipso facto, the suit must have been brought for an "improper purpose" and was, therefore, prosecuted in "bad faith", 921 F.2d at 1520-21. The operative phrase contained in Rule 11 is:

> that [the pleading] is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....

The panel concluded that a "frivolous" suit is necessarily one which is brought "to harass" and is therefore brought within the language of this section. This conclusion is at odds with the language and purpose of the Rule and with interpretive decisions in other Circuits.

The phrase "improper purpose", when properly con-

strued, must relate to something other than the normal litigation process and its aim of making a plaintiff whole. For the filing of a complaint to be done for an "improper purpose" it must be done for reasons "such as to harass", and harassment must be something more than simply seeking compensation for a wrong.

An improper purpose might be evidenced by the tactics used in the litigation, e.g., conduct which is dilatory or which occasionsunnecessary expense (such as discovery abuse), or might be shown by extrinsic evidence demonstrating a purpose other than the seeking of compensation, e.g., to generate publicity, or to bring pressure to accede to terms in a transaction unrelated to the litigation, to gain competitive advantage, or to vent personal malice. Compare, In re Kunstler, 914 F.2d at 519-520. There is no evidence of any such conduct or purpose in this case, sanctions should not have been imposed under the "improper purpose" prong of Rule 11, and certiorari should be granted to ensure proper application and construction of that phrase.

d. The process that is due a person before financially ruinous Rule 11 sanctions are imposed includes a hearing to consider the person's ability to pay.

A determination of whether a sanction will be an effective deterrent cannot be made without a factual determination -- both as to the specific circumstances of those involved (individual deterrence) and the impact any specific sanction will have on other members of the Bar (general deterrence). This requires, at the least, a factual evaluation and determination (if monetary sanctions are deemed appropriate) of an ability to pay (since Rule 11 was not intended to impoverish attorneys and litigants, or to drive them into bankruptcy, but only to deter specific conduct) and of the sanction's effect on the attorney's continued ability to practice. While a $5,000.00 sanction might be a "slap on the wrist" to a financially successful partner in a major law firm, the same sanction might be totally destructive if imposed on a sole practitioner

with a financially marginal practice. See, e.g., Doering, 857 F.2d at 194-197 (3rd Cir., 1988); In re Yagman, 796F.2d 1165, 1185 (9th Cir., 1986).

The $300,000+ sanction imposed by the Court of Appeals is without question totally destructive in Mr. Schlanger's case. In such circumstances, a hearing is necessary. See, e.g., Donaldson v. Clark, 819 F.2d 1551, 1562 (11 Cir., 1987) (Johnson, J., with Tjoflat, Kravitch and Hatchett, JJ., concurring).

Certiorari should be granted to insure that persons being subjected to the imposition of sanctions are given the process due them, including a hearing.

2. The panel members should have recused themselves from further participation in this case after the first appeal was decided because the "appearance of impartiality" has been destroyed insofar as further proceedings were concerned.

The Third Circuit recently ordered the removal of a district court judge from a pending case because his strong comments in an opinion concerning the defendants destroyed "the appearance of impartiality", Haines v. Liggett Group, Inc., 975 F.2d 81, 98 (3rd Cir., 1992). The panel members in this case should have recused themselves and permitted a different panel to decide this appeal. This Court should grant certiorari and hold that the same standards which are applied to district judges should be applied to judges of the Court of Appeals.

In this case, the panel (which operated as the fact-finder) had accused Messrs. Schlanger and Pelletier of extortion and of engaging in a "shake down". It issued a plainly-worded mandate which was enforced according to its terms and the spirit of theopinion by the district court. Despite the panel's clearly expressed hostility and the evident personal animus it held toward Messrs. Schlanger and Pelletier, it sat to decide

the appeal, review its earlier factual decisions and interpret its earlier mandate. The result was an increase in the judgment amount from the $43,318.50, ordered by the district court in accordance with the plain meaning of the words of the opinion and mandate, to over $301,000.00.

As the Third Circuit noted in Haines, "The right to a trial by an impartial judge is a basic requirement of due process. Reassignment is appropriate to preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice." This should be no less true of the functioning of an appellate court. The statements made in the earlier opinion by the panel, acting as fact-finders, creates at least the appearance that they are no longer "neutral, impartial administrator[s] of justice", and this Court should declare that recusal is the proper remedy in such a circumstance.

3. Rule 11 sanctions should not be imposed when Court of Appeals affirms a grant of summary judgment based on adversely-drawn inferences while deciding issues which were neither raised nor briefed on appeal.

   a. The summary judgment granted to the defendant was erroneously affirmed.

The district court decided Zweifel's summary judgment motion by determining that it was unreasonable to infer from the evidence that Zweifel knowingly participated in a scheme to defraud. The district court did not, however, explain why it believed the inference was unreasonable in light of the evidence presented.

The Court of Appeals went one step further and, in affirming the district court's grant of summary judgment, viewed many of the crucial facts in a light most favorable to Zweifel, the moving party, rather than Pelletier (who was opposing the motion). Viewing the facts in that light, the Court of Appeals naturally found that there was no scheme to

defraud and that Pelletier could, therefore, not prevail.

Both the Court of Appeals and the district court erred in the application of the standard by which motions for summary judgment should be measured and certiorari should be granted to correct this significant deviation from the standards set by this Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

The question is, when (as here) inferences are sought to be drawn from facts and those inferences concern a party's state of mind, intent, knowledge and motive, what constitutes a "genuine issue of material fact" in dispute. Here there was abundant evidence that Zweifel was an active participant in Culpepper's scheme to defraud. When, in these circumstances, a court grants summary judgment it is weighing the evidence and drawing conclusions based not on what other reasonable people might infer but based only on what the court infers. This it may not do.

Fraud is often subtle and difficult to prove with direct evidence; its existence is often a matter of inference. As the Court of Appeals of Georgia recently observed:

> The most successful fraud, and the most dangerous, is that which even when held up to light can be turned in such a way as to cast a flattering shadow.... We did not say [in our opinion] that [the appellant] committed a fraud, but we have no hesitation in saying that the underlying facts found by the trial court make out a case for at least constructive fraud, perhaps the more so because it seems so hard to detect.
>
> Liniado v. Alexander, ___ Ga.App. ___, ___ (1991), on motion for rehearing.

A determination of whether an individual knowingly participated in, or aided and abetted, a fraudulent scheme is often even more difficult to demonstrate directly. It requires the

fact-finder to determine intent, to weigh the knowledge, state of mind, and motive of the party charged -- and to consider the plausibility of the explanations given for the acts committed -- to determine whether he was acting innocently and independently or is culpable as an active participant. If there is any substantial evidence to indicate culpability, then it is not for a court to determine these things as a matter of law; it must be left for the jurors -- who can view the witnesses, hear their testimony and judge their demeanor and credibility.

As this Court stated in Liberty Lobby, 477 U.S., at 257, "the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Such was the case here. The district court did not find that there was insufficient evidence from which a jury could find a scheme to defraud but held only that the evidence was insufficient to sustain an inference that Zweifel was a knowingparticipant in that scheme.

The district court and the Court of Appeals failed to explain why Zweifel's willful participation in a bankruptcy fraud is not evidence of his "knowing participation" in the scheme.

The district court and the Court of Appeals failed to explain why Zweifel's assistance to Culpepper in obtaining a replacement stock certificate following the admitted swindle perpetrated on Langston (another shareholder in Culpepper's company) in 1983 was not evidence of his "knowing participation" in the scheme.

The district court and the Court of Appeals failed to explain why Zweifel's failure to advise the board of directors of their power to break the apparent corporate deadlock was not evidence of his "knowing participation" in the scheme.

The district court and the Court of Appeals failed to

explain why Zweifel's contumacious actions in the light of numerous board resolutions was not evidence of his "knowing participation" in the scheme.

Certiorari should be granted to insure (1) that mere loss by a plaintiff of a summary judgment motion is not grounds for the imposition of Rule 11 sanctions, (2) that Rule 56 is not used to terminate prematurely arguably meritorious (though controversial and unpopular) suits and (3) that, where (as here) there is evidence of a knowing or willful participation in a fraudulent scheme or conspiracy, it is a jury and not a judge which ultimately decides the question.

b. The Court of Appeals should not have determined facts and decided issues of law which were neither briefed nor argued on appeal and should not have imposed sanctions based on a constricted reading of the RICO Act.

The Court of Appeals seized upon this case to send a message to plaintiffs generally:

> At a time when the federal courts - which are a scarce dispute resolution resoure, indeed - are straining under the pressure of an ever-increasing caseload, we simply cannot tolerate this type of litigation. Particularly with regard to civil RICO claims, plaintiffs must stop and think before filing them. If used correctly, the civil RICO provisions may have many salutary effects. Whenused improperly, as in this case, those provisions allow a complainant to shake down his opponent and, given the expense of defedning a RICO charge, to extort a settlement. Such improper use of the civil RICO provisions comes at the expense of the federal judiciary and those who need ready access to the courts.
>
> Pelletier v. Zweifel, 921 F.2d at 1522 (emphasis in original).

In order to send this message and to support its novel conclusion that the imposition of sanctions was warranted against the plaintiff and his counsel (despite the district court's contrary determination), the Court of Appeals had to reach out and, in over 60 pages, decide issues which were neither presented nor briefed on appeal (and as to all of which there is a significant question as to the proper resolution).[5] It held, among other things, that Pelletier's agreement with Culpepper was legally unenforceable, 921 F.2d at 1503, despite part performance (Pelletier's securing a line of credit for BHT); that his claim against Zweifel was barred by res judicata, 921 F.2d at 1500-02, even though the prior suit relied upon was not pled as an affirmative defense; that Pelletier could not possibly have been damaged by the unlawful filing of the bankruptcy petition for BHT, 921 F.2d at 1498;[6] and that, under state law, corporate counsel to a closely-held corporation owed no duty to the shareholders, 921 F.2d at 1491-92, fn.60. The Court of Appeals even undertook to decide issues presented (but not decided) in a different lawsuit -- Pelletier's state court action against Lokey & Bowden,[7] 921 F.2d at 1491, fn.60.

In addition, the Court of Appeals made numerous factual determinations which were either unsupported by the record, or required inferences to be drawn adverse to Pelletier, or were contradicted by evidence in the record. See, e.g. 921 F.2d at:

p.1498: "We hold that Pelletier would be incapable of proving at trial that the alleged bankruptcy fraud proximately caused him injury.";[8]

5. It is certainly at least arguable that any claim which requires a Court of Appeals to spend over 60 pages of analysis to examine and determine its "frivolity" is sufficiently complex and substantive so as not to be the basis for imposition of Rule 11 sanctions.

6. Pelletier's after-the-filing decision to permit BHT to continue to remain in bankruptcy (in an attempt to mitigate his damages and preserve what he could, at that point, of BHT's business and assets) does nothing to detract from the siginificance of the bankruptcy fraud itself and the added expenses incurred by Pelletier because if it.

7. Pelletier v. Lokey & Bowden, 192 Ga.App. 470, 385 S.E. 2d 90 (1989).

8. This question was neither raised by the defendant nor decided by the district court on defendant's motion for summary judgment.

p.1503: "After reviewing the evidence, we conclude that [Culpepper lacked the requisite criminal intent]: Pelletier convinced Culpepper that on Culpepper's signature on a contract would trigger Pelletier's pur chase of the Hurst Group's stock. Zweifel, therefore, could not have participated in a scheme to defraud -- there simplywas no scheme.";

p.1504: "Culpepper never intended to induce Pelletier to act ..."

"Pelletier and Culpepper ... must have realized that any oral promises ... were unenforceable."

"Culpepper believed that negotiations would continue, and that if the final draft agreement prepared by Conner was suitable, he would sign it.";

p.1505: "The record discloses that Zweifel did not know prior to the January 8 meeting in Conner's office that Pelletier already had purchased the Hurst Group's stock.";[9]

p.1506: "Zweifel's actions in the bankruptcy proceeings bolster his claim that he acted in good faith.";

"Assuming that Culpepper had devised a scheme as described by Pelletier, the evidence clearly shows that Zweifel was doing everything possible to ensure its failure.";

p.1507: "... according to Pelletier, he would not have purchased the Hurst Group's stock 'without such promises and guarantees [of certain financial and managerial controls].' Pelletier alleges that Zweifel

9. But the evidence indicates that Zweifel did know this prior to the meeting. See, e.g., Plaintiff's exhibit 40 (letter from Zweifel); see also Plaintiff's exhibit 20.

counseled Culpepper to make such a promise. Furthermore, he alleges that he would not have purchased the stock had he known the extent of the Hurst Group's misappropriation of funds from the company -- a fact well known by Zweifel at the time Pelletier purchased the stock. On their face, these allegations seem reasonable and, if true, would likely satisfy section 1964(c)'s proximate cause requirement. Unfortunately for Pelletier, they are not true." (emphasis supplied);

p.1508: "Pelletier must have realized that his oral understanding with Culpepper was unenforceable.";

"Pelletier went into this transaction with his eyes wide open: he took a chance that did not pay off.";

p.1509: "He [Pelletier] did not rely on the alleged misrepresentations and therefore cannot claim that his injury was proximately caused by Culpepper's fraudulent scheme.";[10]

"Obviously, Pelletier based his estimate of the company's value solely on the amount of sales it had been generating. He did not care that the owners had been draining funds from the company through the company's expense accounts."

In context, the Court of Appeals' determination of frivolity is difficult to accept. Although the panel made it exquisitely clear in over 60 pages of analysis that it thought that Messrs. Schlanger and Pelletier should have better parsed the statute and should have known that their RICO claims against Mr. Zweifel could not succeed, and then harshly criticized them for reading RICO broadly, this Court has held that a "pinched construction" of RICO is inappropriate, that "legitimate businesses 'enjoy neither an inherent incapacity for criminal

10. But see, to the contrary, the testimony of Pelletier, Pelletier depo., pp. 65-67; 106-109; 34-35.

activity nor immunity from its consequences'" and that, although "RICO may be a poorly drafted statute ...[,] rewriting it is a job for Congress, if it is so inclined, and not for this Court." H.J., Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 2905 (1989).

Indeed, four Justices joined in an opinion that stated that even they are not sure what would constitute a violation of the RICO Act. See, H.J., Inc., 109 S.Ct. at 2907-2908 (Scalia, J., concurring):

> Today, four years [after Sedima] and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Courtdoes little more than repromulgate those hints as to what RICO means.... This seems to me about as helpful to the conduct of [the lower courts'] affairs as "life is a fountain." ...
>
> It is, however, unfair to be so critical of the Court's effort because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application.

Although the Court of Appeals' scathing opinion has had the desired deterrent effect (even without the enormous monetary sanction),[11] it is not beyond argument that imposition of sanctions in a context where even Justices of this Court are uncertain about the parameters of the statute is neither

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11. Attorney Schlanger will almost certainly never file another RICO suit and has now had to deal with the specter of the Eleventh Circuit's opinion in almost every federal court case he files on behalf of a plaintiff.

appropriate nor just and that Messrs. Pelletier and Schlanger are being sanctioned for being wrong, not for being frivolous.

Certiorari should be granted to insure that Rule 11 is not used in circumstances where the law is unclear and the facts complex, so that its application will not, as the Court of Appeals' opinion is certain to, chill the creativity or zealousness of attorneys in advocating their clients' claims.

CONCLUSION

For all of the foregoing reasons, this Court should issue a wirt of certiorari, vacate the Court of Appeals' opinions, reverse the Court of Appeals' order mandating imposition of Rule 11 sanctions, and remand the case to the district court for further proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 12 day of August, 1993, served all counsel of record with the foregoing PETITION FOR WRIT OF CERTIORARI by depositing three copies in the U.S. Mail in a envelope with sufficient postage affixed to insure delivery and addressed to:

Robert E. Hicks, Esq.
Robert A. Bartlett, Esq.
Hicks, Maloof & Campbell
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285 Peachtree Center Avenue, N.E.
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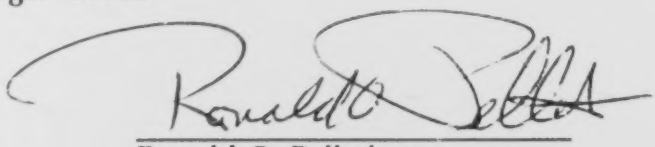

Ronald O. Pelletier
Pro Se

Appendix

1. Order of the District Court on Motion for Summary Judgment App. 1

2. Order of the District Court on Motion for Sanctions App. 15

3. Order of the District Court imposing Sanctions as directed by the Court of Appeals App. 18

4. Opinion of the Court of Appeals, March 18, 1993 App. 24

5. Order of the District Court on remand, March 22, 1993 App. 30

6. Order of the Court of Appeals denying re-hearing, May 14, 1993 App. 31

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	
	:	CIVIL NO.
vs.	:	1:86-CV-156-ODE
GARY D. ZWEIFEL	:	(Filed AUG 11, 1988)
	:	

ORDER

This action is before the court on motion by Defendant for summary judgment. Plaintiff charges that Defendant violated §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, the Georgia equivalent of §10(b) and Rule 10b-5, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). As predicate acts under RICO Plaintiff alleges that Defendant engaged in mail fraud in violation of 18 U.S.C. §1341, wire fraud in violation of 18 U.S.C. §1343, fraud in violation of 18 U.S.C. §1952; bankruptcy fraud in violation of 18 U.S.C. §152, securities fraud under §10(b) of the Securities Exchange Act, and intimidation of a federal witness in violation of 18 U.S.C. §1503. Defendant moves for summary judgment on all of these claims.[1]

Plaintiff Ronald O. Pelletier is a former investor in Buckhead House of Travel, a travel agency. Defendant

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[1] In its order dated January 6, 1988, the court allowed Plaintiff to revive his claim of bankruptcy fraud, but denied Plaintiff leave to add a claim under the Georgia analog to RICO. Defendant filed a counterclaim for abuse of litigation under Georgia law, the substance of which is not addressed in the instant motion.

Gary D. Zweifel is an Atlanta attorney who at relevant times acted as counsel to Buckhead House of Travel. The gist of Pelletier's claims herein is that Zweifel knowingly aided C. M. Culpepper, president and part owner of Buckhead House of Travel, in deceiving Mr. Pelletier in connection with Pelletier's purchase of shares of stock in Buckhead House of Travel from Pelham H. Robinson, W. Leon Hurst, and William C. Hurst (hereinafter collectively "the Hurst Group"). Because the record reflects that Pelletier's purchase of the Hurst stock occurred before he had any dealings with Zweifel, and also because the record reflects that Zweifel did not assist Culpepper in negotiating with Pelletier prior to Pelletier's purchase of the Hurst stock, Defendant's motion for summary judgment on the securities claims will be granted. Also, Defendant's motion will be granted as to Plaintiff's RICO claims for the reasons stated below.

In the late 1970's and early 1980's, the 100 outstanding shares of Buckhead House of Travel were owned equally by Clyde M. Culpepper and Leroy Langston.[2] Culpepper actively ran the business; Langston was inactive. Although the agency generated very substantial revenues, it was in a constant state of turmoil due to financial mismanagement by Mr. Culpepper. In the fall of 1983, one such financial emergency occurred when Culpepper was notified by IRS that the company owed $43,000 in overdue FICA taxes. Culpepper and Langston were unable to agree on a method of raising the cash for

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[2] Langston's wife had an interest in some of the shares; for ease of reference the shares will be referred to as belonging to Mr. Langston only.

IRS. Ultimately, Langston agreed that he would sell some of his shares to raise cash, so long as Culpepper would sell an equivalent number of his shares.

It is not clear how the Hurst Group, which then purchased shares, came in contact with Culpepper and Langston. In any event, on October 7, 1983, a written agreement was executed between Culpepper, Langston, and the Hurst Group whereby Culpepper and Langston each would sell 40 shares of stock to the Hurst Group. Shortly thereafter, Langston transferred his 40 shares in exchange for a check for the agreed purchase price. However, Culpepper made no transfer. It is unclear what happened; this issue has not been directly addressed in the parties' briefs. Culpepper's own version is that his inclusion in the contract of sale was merely a ruse to get Langston to sell his shares, and that the Hurst Group knew and agreed all along that Culpepper would not have to sell any shares. In any event, Culpepper remained as president of Buckhead House of Travel after October, 1983, and continued to run the business.

However, various emergencies occasioned by cash shortages continued to occur. The relationship between the Hurst Group and Mr. Culpepper was strained, to say the least. Each accused the other of acts of fraud and mismanagement. The situation was awkward, because the corporation was deadlocked. The Hurst Group had formed a liaison with Langston, but Culpepper still was the record owner of 50% of the shares.

In the fall of 1984, the Hurst Group negotiated with Wilbur Brown, the owner of a rival travel agency, to sell their shares in Buckhead House of Travel. At about the

same time, the Hurst Group asserted, through their attorney, that Culpepper had breached the October 7, 1983 contract to sell his shares to them. Culpepper consulted Defendant Gary D. Zweifel, partner with the Atlanta law firm of Lokey and Bowden concerning these allegations. Lokey and Bowden had been retained as corporate counsel for Buckhead House of Travel earlier in 1984. Lokey and Bowden had had nothing to do with the 1983 Hurst/Langston/Culpepper contract.

In September, 1984, Brown offered to buy Culpepper's shares. Culpepper and Zweifel indicated Culpepper would consider the matter.

On November 1, 1984, the Hurst Group executed an agreement whereby they sold all of their shares in Buckhead House of Travel to Travel Incorporated, Wilbur Brown's company. The contract expressly provided that if Brown was unable to effect a purchase of an additional 50% of the stock (presumably from Culpepper) within 180 days of his purchase of the Hurst Group's shares, Travel Incorporated would have the right to rescind. In the November 1, 1984 contract, the Hurst Group conditionally assigned to Travel Incorporated all causes of action they had against Culpepper growing out of the aborted 1983 transaction.

On November 9, 1984, two members of the Hurst Group filed suit against Culpepper in the State Court of Fulton County seeking both specific performance as to the 1983 agreement and damages against Culpepper. The record does not make it clear whether the filing of this suit was related to Wilbur Brown's stock purchase, but the court infers that it was.

Sometime in late November or early December, 1984, it became clear to Wilbur Brown that Culpepper was not going to sell his shares in Buckhead House of Travel. Accordingly, Brown contacted Pelham Robinson, a member of the Hurst Group, and told him they might as well go ahead and sell their stock to somebody else. At that point, the Hurst Group got in touch with Ronald O. Pelletier, Plaintiff herein. Mr. Pelletier, like Wilbur Brown, owned an interest in a rival travel agency.

Pelletier began negotiating with the Hurst Group and with Culpepper in mid-December, 1984. He offered to buy the Hurst Group's shares but not Culpepper's. He told Culpepper he was interested in buying the Hurst Group's shares, and would infuse capital into the corporation, but only if Culpepper would relinquish certain managerial and financial control functions. According to Pelletier, Culpepper verbally agreed to do this.[3] The record contains no evidence that Zweifel participated in any meetings at this point with Pelletier; the record reflects that Zweifel did not advise Culpepper in this matter prior to January 8, 1985.

On December 29, 1984, a written agreement between Pelletier and the Hurst Group was executed whereby the Hurst Group sold its 40 shares to Pelletier for $150,000.

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[3] Culpepper may disagree with Pelletier's version of these facts. Culpepper testified that (1) he first talked with Pelletier after Pelletier bought his stock; (2) he first talked to Pelletier when Pelletier had an option to buy the stock. Culpepper's deposition testimony does not specify exactly what, if anything, Culpepper felt he had agreed to do to induce Pelletier to buy stock.

Additionally, the Hurst Group assigned to Pelletier its causes of action in the then-pending state court law suit growing out of the aborted 1983 transaction. The agreement explicitly stipulated that it was not to be disclosed to Culpepper.

On January 8, 1985, Culpepper went to a meeting at the offices of Pelletier's counsel, Alston & Bird. Culpepper took Defendant Zweifel with him. Pelletier's counsel had prepared a draft of an agreement reflecting Culpepper's acquiescence in Pelletier's financial management of the corporation. Culpepper read the draft agreement, and refused to sign it.[4] This development angered Pelletier, who on January 3 had personally guaranteed a $100,000 line of credit for Buckhead House of Travel, $30,000 of which had already been drawn down.

The agreement which Culpepper refused to sign maintained him as titular president of the corporation, but drastically limited his prerogatives in financial matters. For example, he could not authorize payment of any expenses exceeding $1,000. The agreement fixed Culpepper's salary and reimbursable expenses at set amounts. It specifically provided that Culpepper's wife and son would continue as employees, but on specified terms and conditions, including that they each work at least 40 hours a week. The agreement called for Culpepper to warrant that he was the owner of 50 shares of stock in the corporation, and that the stock was free from claims by

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[4] Culpepper's deposition testimony suggests, but does not make clear, that he generally felt that the document gave too much control to Pelletier. Culpepper was not asked what specific parts of the proposal he objected to.

others.[5] Liquidated damages of $50,000 were specified should any of the representations be false.

Although the proposed agreement recited that it was in anticipation of the possibility that Pelletier might purchase the shares of the Hurst Group, in reality Pelletier had already bought the shares and was in a position to assert the rights of the Hurst Group to Culpepper's stock in the pending state court litigation. If Pelletier had been successful in this litigation, then he would own 80% of the shares, with Langston and Culpepper each owning 10%.

After the aborted January 8, 1985 meeting, accusations and counter accusations were swapped as between Culpepper and his counsel on the one hand and Pelletier and his counsel on the other hand. Several days after January 8, 1985, Pelletier announced to Culpepper and Zweifel that he had purchased the Hurst Group shares; he demanded to be recognized as a shareholder of record. At this point, Defendant Zweifel pointed out (correctly) that all of the shares of the corporation bore a restrictive legend such that under the charter and by-laws, the shares could be transferred only with the approval of 75% of the board of directors, which could not be obtained. The board only had three members: two members of the Hurst Group and Mr. Culpepper.

In mid-January, 1985, Pelletier and Langston filed a lawsuit in the Superior Court of Fulton County against the corporation, Culpepper, and William and Charles

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[5] Of course, Pelletier knew the stock was encumbered by the claims he had just purchased.

Hurst. The lawsuit sought the appointment of a receiver for the corporation, citing corporate deadlock; it sought the appointment of a provisional director and damages from Culpepper.[6]

On January 16, 1985, a temporary restraining order was entered against Buckhead House of Travel and Clyde Culpepper essentially enjoining them from dissipating corporate assets. The same day, a consent order was entered essentially reflecting the provisions of the previously entered restraining order and providing that Pelletier and those affiliated with him should have immediate access to the books and records of Buckhead House of Travel.

The discovery contemplated by the consent order did not go smoothly. For example, Pelletier's counsel were told while they were on the company premises on January 17 that they could not use the restroom, use the telephone, or have any coffee. They were relegated to an unheated room. Counsel for Buckhead House of Travel, Defendant Zweifel, placed various conditions on the review of records which had not been contemplated by the court order requiring that the documents be made available.

During February, 1985, various corporate meetings were attempted; none were successful due to the deadlocked status of the corporation.

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[6] Clyde Culpepper was represented in this lawsuit by Gary P. Bunch, an attorney with the law firm of Thrasher and Whitley, and also by Nickolas P. Chilivis, an attorney with the law firm of Chilivis and Grindler.

On March 13, 1985, an evidentiary hearing was held in the Superior Court of Fulton County on plaintiff's request for further temporary injunctive relief. The court entered an order which essentially relieved Mr. Culpepper of managerial control and appointed one James Lurwig to manage the company. Immediately after the court had announced its ruling, counsel for Buckhead House of Travel stated that it had just filed a bankruptcy petition for Buckhead House of Travel in the Bankruptcy Court for the Northern District of Georgia, seeking reorganization for the company. The corporate officer authorizing that decision was Clyde Culpepper.

Buckhead House of Travel was represented in the reorganization proceedings by Donald Rickertsen of the law firm of Bisbee, Parker and Rickertsen. Mr. Rickertsen prepared and filed the bankruptcy petition, and generally represented the debtor throughout the proceedings which concluded in 1986. In February, 1986, a plan of reorganization was confirmed by the bankruptcy judge. This plan called for all of the stock of Buckhead House of Travel to be transferred to a corporate purchaser which would pay $125,000 in cash. The bulk of Buckhead House of Travel's assets would be retained within the bankruptcy court's jurisdiction and liquidated for the benefit of Buckhead House of Travel creditors. The plan noted that the purchaser of the stock planned to operate a travel business and might employ Mr. Culpepper as a salesman. Apparently, the plan was consummated.

The following claims are now before the court on Defendant's motion for summary judgment. First, Plaintiff claims Defendant is liable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.

§1961 *et seq.* Secondly, he claims Defendant violated §10b(5) of the Securities Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, as well as the Georgia analog, O.C.G.A. §10-5-12(a)(2).

Plaintiff's referenced securities claims are premised on the theory that Clyde Culpepper made material misrepresentations to Pelletier in connection with Pelletier's purchase of the Hurst Group stock. Specifically, Pelletier contends that Culpepper misrepresented that he was willing to give up financial control of the corporation, when in reality he was not. Plaintiff then asserts that Defendant Zweifel, as counsel to Culpepper, knowingly aided Culpepper in perpetrating this deception.

Assuming that Culpepper in fact was seeking to deceive Pelletier so that Pelletier would infuse capital into the corporation, the record wholly fails to support Plaintiff's claim that Defendant Zweifel was a knowing participant in this scheme. All of the direct contacts which Pelletier had with Zweifel began on January 8, 1985, more than a week after Pelletier had purchased the Hurst Group stock and paid $150,000 for it. Secondly, the record simply does not support a contention that Zweifel gave Culpepper advice or assistance in any representations Culpepper may have made to Pelletier before Pelletier purchased the stock. Thus, it cannot be said that any misrepresentations for which Zweifel might be responsible were made "in connection with" Pelletier's purchase of the stock as the express language of the referenced federal and state statutes literally require. Furthermore, nothing that Defendant Zweifel did after he began dealing directly with Pelletier constituted misrepresentation, manipulation, or deception. While it is true

that Zweifel refused to cooperate with Pelletier, there was no actual or attempted misrepresentation involved.

The Plaintiff's argument appears to be that Defendant Zweifel must have realized that Culpepper had tricked Pelletier into buying the Hurst Group stock, once Zweifel learned of Pelletier's purchase. The reason Plaintiff argues Zweifel must have so realized is that Culpepper (presumably) had previously told Zweifel of the ruse perpetrated on Langston in 1983; Zweifel therefore was on notice that Culpepper probably was trying to trick Pelletier as well. Therefore, when Zweifel aided Culpepper by advising him at the January 8 meeting and by resisting the recognition of Pelletier as a shareholder of record, he committed securities fraud.

The court does not accept this reasoning. In the first place, as noted, Pelletier had already bought his stock; the actions taken by Zweifel did not affect that sale. Furthermore, even if Zweifel knew or suspected that Culpepper had tricked Langston in 1983, this would be insufficient to impart knowledge to Zweifel that the proposed written agreement reflected the terms of any verbal agreement Culpepper and Pelletier might have made previously. Zweifel had not been a party to the negotiations between Culpepper and Pelletier, and had no knowledge of the details.

Pelletier's RICO claims actually consist of four separate claims brought under each of the following sections: 18 U.S.C. §1962(a); 18 U.S.C. §1962(b); 18 U.S.C. §1962(c); 18 U.S.C. §1962(d). In essence, §1962(a) proscribes the use of funds derived from a pattern of racketeering activity in an enterprise; §1962(b) proscribes the maintenance of an

interest in an enterprise through a pattern of racketeering activity; in an enterprise through a pattern of racketeering activity; §1962(d) proscribes conspiracy to violate subsections (a), (b), or (c).

The term "pattern of racketeering activity" is a defined term under RICO. Specifically, 18 U.S.C. §1961(1) sets out precisely which criminal acts may be deemed "racketeering activity"; §1961(5) states that a "pattern" requires at least two acts of "racketeering activity."

The complaint herein alleges that Defendant Zweifel committed violations of the following criminal statutes which constitute acts of "racketeering activity" under §1961(1): 18 U.S.C. §1341 (mail fraud); 18 U.S.C. §1343 (wire fraud); 18 U.S.C. §1952 (use of interstate facilities to distribute proceeds of "unlawful activity" or to promote or carry on "unlawful activity"); 18 U.S.C. §152 (bankruptcy fraud).

Neither wire fraud nor mail fraud is a viable predicate act, *i.e.*, act of racketeering activity, for the instant RICO claims. That is because both wire fraud and mail fraud are premised on a knowing attempt to deceive. As previously stated, the record simply fails to support Plaintiff's claim that Mr. Zweifel knew facts which placed him on notice that Clyde Culpepper was seeking to swindle Mr. Pelletier, and that Zweifel then elected to assist Culpepper.

The alleged violations of 18 U.S.C. §1952 are not viable predicate acts because there was no "unlawful activity" as defined by 18 U.S.C. §1952(b). Plaintiff apparently asserts that Zweifel committed extortion, which does constitute "unlawful activity" for purposes of §1952,

but the record reflects that Zweifel did not extort any money or property from Pelletier, or assist Culpepper in doing so. The record is clear that the $150,000 was obtained by the Hurst Group, not by Culpepper or Zweifel. Neither did Zweifel assist the Hurst Group in any manner.

18 U.S.C. §152, proscribing concealment of assets, false oaths and claims and bribery in the context of a bankruptcy proceeding does not apply as a predicate act under the facts shown by the evidence. While Plaintiff contends that various individuals made misrepresentations to the bankruptcy court during the pendency of the proceedings, there is no evidence that Defendant Zweifel had any connection to any of them. Neither Zweifel nor Lokey and Bowden were active in the bankruptcy proceedings. Neither does the evidence permit an inference that Don Rickertsen, attorney for the debtor, was acting as a pawn for Lokey and Bowden or Defendant Zweifel.[7]

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[7] Plaintiff's first amended complaint also alleged a violation of 18 U.S.C. §1503 as a RICO predicate act. In its order entered January 9, 1987, the court dismissed the allegations of violation of §1503. It did so in error, as this section generally proscribes obstruction of justice, not merely tampering with a juror or court officer. The Plaintiff seeks to assert that Defendant Zweifel violated this section when he spoke harshly to Emily Langston, wife of Leroy Langston. Plaintiff's theory is that Zweifel should have realized that Mrs. Langston probably would be a witness in a legal proceeding affecting Buckhead House of Travel, and that he intended to intimidate her. However, to sustain a claim that Zweifel violated this statute, Pelletier would be required to show that Zweifel threatened Mrs. Langston "knowing of a pending judicial proceeding" in

(Continued on following page)

Because the record fails to support Plaintiff's claim that Defendant Zweifel committed any of the criminal acts which allegedly constitute a "pattern of racketeering activity," there is no "pattern of racketeering activity." Neither is there evidence that Zweifel agreed or attempted to commit a violation. Hence, there are no actionable RICO violations.

Because the evidence does not support Plaintiff's claims of securities fraud or RICO violations, Defendant's motion for summary judgment is GRANTED.

SO ORDERED, this 11 day of August, 1988.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

(Continued from previous page)

which she was likely to testify and "specifically intended to impede its administration." *United States v. Guzzine*, 810 F.2d 687 (7th Cir. 1987). As there is no showing that Zweifel had any specific reason to think that Mrs. Langston was about to testify in a particular legal proceeding, and his remarks to her made no specific mention of any pending proceeding, there is no violation of this statute as a matter of law.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	CIVIL NO.
	:	1:86-CV-156-ODE
vs.	:	FILED
GARY D. ZWEIFEL	:	JUL 10 1989

ORDER

This civil suit for damages is before the court on Defendant's motion pursuant to Rule 11 of the Federal Rules of Civil Procedure for an award of reasonable attorney's fees and expenses. On August 11, 1988, this court entered summary judgment in Defendant's favor. Having read and considered the Defendant's motion and brief, as well as Plaintiff's response thereto, the motion is hereby DENIED.

Rule 11, Federal Rules of Civil Procedure, provides in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in

> violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Although the pivotal inquiry is whether Plaintiff's complaint as amended was, to the best of his attorney's knowledge, information and belief after reasonable inquiry "well grounded in fact and warranted by existing law", Defendant's motion does not specifically address this factor. Rather, Defendant's motion simply sets out his version of the facts which he believes compelled the conclusion that he was entitled to prevail. Defendant does not address exactly which of the facts set forth in Plaintiff's extremely fact specific complaint were wrong, or why Plaintiff's counsel should have known that they were wrong. Neither does he specifically point out any allegations in the complaint which are misleading by reason of omission of facts which should have been available to Plaintiff's counsel through reasonable inquiry. The court's impression is that many of the discrete facts specifically pled in the complaint are true; nonetheless, the inference sought by Plaintiff, namely, that the Defendant was a knowing participant in a fraudulent scheme along with one C. M. Culpepper, is not warranted by the evidence as presented by Defendant's motion for summary judgment and Plaintiff's response thereto. Plaintiff's theory seemed to be that because of actions of Defendant of an over-reaching nature, it could be inferred that he was

not merely acting as a professional advisor for Mr. Culpepper. However, there was no evidence that the Defendant participated in or had knowledge of the specific negotiations between Mr. Culpepper and the Plaintiff which were the basis for Plaintiff's claims of fraud. That being the case, the Defendant was entitled to the grant of the motion for summary judgment, but the Rule 11 motion must be denied.

The court can well understand the Defendant's outrage at being charged with being a "racketeer." However, Plaintiff cannot be faulted for the fact that Congress enacted legislation which allows such a claim to be made against an individual who by no stretch of the imagination would be thought of as a racketeer by any intelligent member of the public.

In summary, the Defendant's motion for Rule 11 sanctions is hereby DENIED.

SO ORDERED, this 10 day of July, 1989.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	
	:	
vs.	:	CIVIL NO. 1:86-cv-156-ODE
	:	
GARY D. ZWEIFEL	:	

ORDER

This civil action is before the court on Defendant's amended motion for sanctions and Plaintiff's counsel's motion for an evidentiary hearing and re-determination of appropriate sanctions.

This case is presently on remand from the Eleventh Circuit Court of Appeals. By order dated August 11, 1988, this court granted Defendant's motion for summary judgment. By order dated July 10, 1989, this court denied Defendant's motion for an award of sanctions pursuant to Fed. R. Civ. P. 11. The parties appealed these rulings. In Pelletier v. Zweifel, 921 F. 2d 1465 (11th Cir. 1991), the Eleventh Circuit affirmed the grant of summary judgment to Defendant and reversed and remanded with instructions the denial of Defendant's motion for Rule 11 sanctions.

The Court of appeals held that the conduct of Plaintiff, Ronald Pelletier, and Plaintiff's counsel, Herbert Schlanger, warranted sanctions under both Rule 11 and Fed. R. App.P. 38.[1] The Court held that such sanctions should be imposed jointly and severally on Mr. Pelletier and Mr. Schlanger. As regards Rule 11 sanctions, the court instructed:

1. Fed.R.App.P. 38 allows the imposition of sanctions for the filing of a frivolous appeal

> With respect to the amount of the sanction, we direct the district court, upon receipt of our mandate, to award Zweifel a sum of money that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions. Such award shall take into account any fees, expenses, and costs Zweifel may incur, on remand, in obtaining the award.

Pelletier, 921 F.2d at 1522.[2] As regards sanctions under Rule 38, the Eleventh Court stated:

> We do not hesitate one whit in awarding Zweifel double costs and a reasonable attorney's fee for opposing Pelletier's appeal. [citation omitted]. On remand, the district court shall determine the amount of that fee and give Zweifel judgment for the full amount thereof against Pelletier and Schlanger, jointly and severally [footnote omitted].

Id. at 1523.

On July 9, 1991, following remand of this action, the court held a hearing regarding the imposition of sanctions against Pelletier and his counsel. At this hearing,the court sought to determine the scope of its responsibilities under the Eleventh Circuit's opinion in Pelletier. The parties agreed that the court's only task upon remand is to determine the amount of "the attorney's fees, litigation expenses, and costs [Defendant] incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions" and the amount of "double costs and a reasonable attorney's fee for opposing Pelletier's appeal." Transcript of July 9, 1991 Hearing, pp. 8, 10, 15 ("Transcript"). The parties specifically agreed that Pelletier does not permit this court to consider evidence concerning the financial situations of Mr. Pelletier and Mr.

2. See also id. at 1470 ("We accordingly remand the case for the imposition of such sanctions as will recompense Zweifel for the expenses that he incurred, including attorney's fees, in defending this suit in the district court.").

Schlanger or the amount of sanctions necessary to deter them from filing baseless claims. Id. at 6-8, 10, 17-19. The court concurs with the parties interpretations of Pelletier.

With respect to Rule 38 sanctions, Defendant has submitted evidence establishing that double costs associated with opposing Plaintiff's appeal amount to $265.00 and that a reasonable attorney's fee for opposing that appeal amounts to $18,053.50, a total of $18,318.50. Defendant states that, in accordance with the Eleventh Circuit's mandate, this total does not include amounts he expended in prosecuting his appeal form this court's denial of his motion for Rule 11 sanctions. Pelletier, 921 F.2d at 1523 n. 104. Plaintiff and his counsel have not in any way contested the reasonabl eness of the amount of Rule 38 sanctions sought by Defendant. The court thus awards Defendant $18,318.50 in Rule 38 sanctions.

As regards Rule 11 sanctions, the court's task is much more complicated. The parties have taken such extreme positions regarding the amount of "the attorney's fees, litigation expenses, and costs [Defendant} incurred" in defending this action and in prosecuting his motion for Rule 11 sanctions that the court is in an extraordinarily difficult situation.

Mr. Pelletier and Mr. Schlanger argue that the term "incurred" refers to "'actual fees which the subject has paid or for which he is liable.'" In re Olson, 884 F.2d 1415, 1422 (D.C. Cir. 1989) (quoting In re Donovan, 877 F.2d 982, 991 (D.C. 1989)) (construing attorney's fees provision of Ethics in Government Act). Plaintiff and his counsel thus contend that the Eleventh Circuit awarded Defendant only his actual out-of-pocket expenses as Rule 11 sanctions. Transcript, p. 4. As Mr. Schlanger has noted, the record contains no evidence that the Defendant paid any expenses in this action. Defendant's counsel states that the insurance carrier for Lokey & Bowden, Defendant former firm, paid all of the expenses associated with the defense of this action and the prosecution of the

motion for Rule 11 sanctions. Id. at 12-14.[3] Mr. Pelletier and Mr. Schlanger have offered no objection to the hourly rate requested by Defendant's counsel or to the amount of hours Defendant's counsel claims were reasonably expended in defending this action. In fact, Plaintiff and his counsel have expressly conceded that neither the hourly rate nor the hours expended are excessive. Id. at 1,3.

Defendant contends that the term "incurred" refers to all expenses necessitated by the filing of this action, regardless of whether he bore those expenses directly. Defendant has submitted evidence establishing that the attorney's fees, litigation expenses, and costs necessitated by the filing of this action and the prosecution of his motion for Rule 11 sanctions amount to $282,837.96 ($267,817.96 requested in amended motion for sanctions + $15,020.00 requested in Supplemental Statement). Defendant argues that, because Plaintiff and his counsel have not contested the reasonableness of this amount, the court only has discretion to award him $282,837.96 as Rule 11 sanctions. Id. at 15.

Plaintiff contends that the amount of "the attorney's fees, litigation expenses, and costs [Defendant] incurred" is zero. Defendant contends that he "incurred" attorney's fees, litigation expenses, and costs of $282,837.96. Plaintiff's position is clearly inconsistent with the former tenor of the Eleventh Circuit's opinion in Pelletier and its manifest expectation that the district court would award "monetary sanctions" under Rule 11. 921 F.2d at 1521. Defendant's position, however, requires the court to impose sanctions in excess of $280,000 without considering the impact of those sanctions on plaintiff and his counsel or the necessity of such a large award. In resolving the dispute between the parties, the court is mindful of both its obligation to implement the spirit of the Court of Appeals' directive.

The court finds that the term "incurred", as used in the Eleventh Circuit's opinion in Pelletier, refers to expenses

3. Lokey & Bowden paid the deductible required by the insurance company. Transcript, p. 14.

actually paid by the Defendant or for which he is liable. The court reaches this conclusion for two reasons. First,the court finds persuasive the decision of the D.C. Circuit Court of Appeals in In re Olson, 884 F.2d 1414, 1422 (D.C. Cir. 1989). The cases cited by Defendant do not bear directly on the meaning of the term "incurred", but rather concern general policy considerations under various attorneys' fees statutes.

Second, the language used by the Eleventh Circuit in Pelletier supports Mr. Pelletier and Mr. Schlanger's contention that the Court of Appeals intended to award Defendant his out-of-pocket expenses. The Eleventh circuit's use of the term "compensate" suggests that the Court intended to reimburse Defendant for those expenses he bore directly. See also supra note 2 (court uses term "recompense"). Furthermore, the language of Rule 11 specifically refers to all expenditures necessitated by the filing of an action. The Eleventh Circuit chose to not use this language, but rather to award Defendant the expenses he incurred "in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions." This narrower language suggests that the Court was awarding Defendant his actual expenses.

To the extent that Defendant did not directly bear any of the financial costs of this action, he "incurred" no expenses within the meaning of the Eleventh Circuit's opinion in Pelletier. However, the Eleventh Circuit clearly contemplated that Mr. Pelletier and Mr. Schlanger would be required to pay significant monetary sanctions in this case. The Court of Appeals found that "Pelletier's complaint had no adequate factual basis and was filed in bad faith." 921 F.2d at 1515. Furthermore, the Eleventh Circuit stated, "Monetary sanctions plainly are warranted in this case. All of the claims Pelletier made clearly fall below the standard of reasonableness required by Rule 11." Id at 1521. In such circumstances, it would be highly inappropriate for this court to fail to award Rule 11 sanctions

against Plaintiff and his counsel. Thus, in order to give effect to the Eleventh Circuit's opinion in Pelletier, the court awards Defendant $25,000 in sanctions under Rule 11.

As a final matter, Mr. Schlanger's motion for an evidentiary hearing and re-determination of appropriate sanctions is DENIED. In that motion, Mr. Schlanger urges the court to conduct an evidentiary hearing regarding the appropriate amount of sanctions it should award against him. This motion is based on recent changes in Mr. Schlanger's financial condition. However, as noted above, Mr. Schlanger has conceded, and the court finds, that the Eleventh Circuit's opinion in Pelletier does not permit it to conduct a hearing regarding the impact of Rule 11 sanctions on plaintiff and his counsel.

Accordingly, Defendant amended motion for sanctions and attorney's fees [87-1 87-2] is GRANTED IN PART and DENIED IN PART. plaintiff's counsel's motion for an evidentiary hearing and re-determination of appropriate sanctions [94-1] is DENIED. The Defendant Gary D. Zweifel shall have judgment of Mr. Pelletier and Mr. Schlanger, jointly and severally, in the sum of $43,318.50.

SO ORDERED, this 26 day of March, 1992.

/s/
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8630
Non-Argument Calendar

D.C. Docket No. 1:86-cv-156-ODE

RONALD O. PELLETIER,

Plaintiff-Appellee,
Cross-Appellant,

versus

GARY D. ZWEIFEL,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

(March 18, 1993)

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and JOHNSON, Senior Circuit Judge.PER CURIAM:

I. In this appeal, Gary D. Zweifel Seeks enforcement of the mandate we issued in Pelletier v. Zweifel, 921, F.2d 1465 (11th

Cir.) (Pelletier I), reh'g denied, 931 F.2d 901 (11th Cir.), cert. denied, _____ U.S. _____, 112 S.Ct. 167 (1991). This panel affirmed the district court's dismissal, under Fed. R. Civ. P. 12(b) (6) and 56, of Ronald O. Pelletier's claims. Id. at 1495.[1] We reversed, however, the district court's decision denying Zweifel relief under Fed. R. Civ. P. 11,[2] concluding that monetary sanctions were in order. Id. at 1521-23. We did so because Pelletier's claims against Zweifel were utterly baseless. We explained that "all of the claims Pelletier made clearly fall below the standard of reasonableness required by Rule 11. While these claims were frivolous when made, they became even more so as discovery proceeded and it became apparent that Pelletier's own evidence contradicted his factual allegations. . . . " Id. at 1521. We concluded that "Pelletier's complaint had no reasonable factual basis when pled and that Pelletier and [his lawyer, Herbert P.] Schlanger knew this. When they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith . . . ." Id. at 1515. We remanded the case to the district court, and directed the court

> to award Zweifel a sum of money [against both Pelletier and Schlanger, jointly and severally] that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court

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1. A detailed exposition of Pelletier's claims and the facts underpinning them may be found in Pelletier I, 921 F.2d at 1470-95.

2. Rule 11 provides in relevant part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, Modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unecessary delay or needless increase in the cost of litigation... If a pleading, motion, or other paper is in violation of this rule, the court, upon motion or uponits own initiative, shall impose upon the person who signed it, a represented party, or both, an apprpriate sanction...

Fed. R. Civ. P. 11 (emphasis added)

> and in prosecuting his motion for Rule 11 sanctions. Such award shall take into account any fees, expenses, and costs Zweifel may incur, on remand, in obtaining the award.

Id. at 1522.

Because Pelletier's appeal was also patently frivolous, we awarded Zweifel, under Fed. R. App. P. 38,[3] "double costs and a reasonable attorney's fee for opposing Pelletier's appeal." Id. at 1523. We directed the district court, on remand, to "determine the amount of that fee and give Zweifel judgment for the full amount thereof against Pelletier and Schlanger, jointly and severally." Id.

At the hearing convened to implement Pelletier I's mandate, Zweifel established that he incurred $282,837.96 in attorney's fees, litigation expenses, and costs in defending the case in the district court, and $18,318.50 on appeal. Pelletier and Schlanger did not challenge the reasonableness of these amounts. Instead, they argued that Zweifel was entitled to recover nothing because he had "incurred" no litigation expenses at all; rather, his insurance company had incurred and paid the expenses. Pelletier and Schlanger supported their argument with the following language (a portion of which we have quoted supra) from Pelletier I: "with respect to the amount of the sanction, we direct the district court, upon receipt of our mandate, to award Zweifel a sum of money that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court . . . ." Id. at 1515 (emphasis added).

This purely semantic argument convinced the district court, and it awarded Zweifel nothing for the litigation expenses that his insurance carrier expended on his behalf in the district court. The court felt that some sanction was warranted under Rule 11, however, and fined Pelletier $25,000 for his

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3. Fed. R. App. P. 38 provides that [i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

conduct at the trial level. Turning to our direction that it award Zweifel double costs and reasonable attorney's fees under Fed. R. App. P. 38, the district court awarded Zweifel $18,318.50 ($265.00 in double costs, and $18,053.50 in attorney's fees) against both Pelletier and Schlanger. Zweifel appeals, and asks us to enforce the Pelletier I mandate with respect to the Rule 11 sanctions; Pelletier and Schlanger cross-appeal and ask us not to enforce the mandate in any respect because Zweifel has "incurred" no litigation expenses in this matter.

II.

We have in this circuit a well-settled "mandate rule" obligating district courts to adhere closely to the dictates of our opinions. See Barber v. International Bhd. of Boilermakers, 841, F.2d 1067, 1070 (11th Cir. 1988); Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc), cert. denied, 484 U.S. 1006, 108 S.Ct. 700 (1988); Piambino v. Bailey, 757 F.2d 1112,1119 (11th Cir. 1985), cert denied, 476 U.S. 1169, 106 S.Ct. 2889 (1986); Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 & n.2 (11th Cir. 1984); Westbrook v. Zant, 743 F.2d 764, 770 (11th Dir. 1984); Dorsey v. Continental Casualty Co., 730 F.2d 675, 678-79 (11th Cir. 1984); United States v. Williams, 728 F.2d 1402,1405-06 (11th Cir. 1984); Baumer v. United States, 685 F.2d 1318, 1321 (11th Cir. 1982).[4] This rule derives from the law of the case doctrine, see Litman, 825 F.2d at 1511; Piambino, 757 F.2d at 1120, and simply means that "a district court is not free to deviate from the appellate court's mandate." Barber, 841 F.2d at 1070 (quoting Wheeler, 746 F.2d at 1440 n.2). An issue decided by an appellate court must be followed in all subsequent proceedings "unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous

4. All circuits have this rule. See Litman, 825 F.2d at 1511.

and, if implemented, would work a manifest injustice." Piambino, 757 F.2d at 1120.

We have outlined a district court's limited role on remand. A district court

> may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion, and the circumstances it embraces. Although the trial court is free to address, as a matter of first impression, those issues not disposed of on appeal, it is bound to follow the appellate court's holdings, both expressed and implied.

Id. at 1119 (citations omitted).

Zweifel contends that the district court erred by refusing to follow our mandate that Rule 11 sanctions be imposed against Pelletier and Schlanger for their conduct before the district court. We agree.

We neither intended nor imagined that the district court, whether at Pelletier's and Schlanger's urging or on its own initiative, would meticulously parse our opinion, as they have done, to determine the meaning of our mandate. The plain language of our opinion indicates that we considered all of Pelletier's claims to be utterly baseless and that we intended Pelletier and Schlanger to pay all of the attorney' fees, litigation expenses, and costs incurred to defend against those claims in the district court. See Pelletier I, 921 F.2d at 1511, 1515, 1522, 1523. At the very lease, the palpable "spirit of the mandate," Piambino, 757 F.2d at 1119, demands this result. The court's sole task on remand was to determine what the fees, expenses, and costs were. See id. at 1522-23. in refusing to carry out this task, and, in deciding instead to fine Pelletier $25,000, the court abused the limited discretion that our mandate left to it. See Barber, 841 F.2d at 1070-71 (prohib-

iting a district court from addressing the issues to be resolved on remand on a novel theory).

It is of no moment that Zweifel purchased insurance to cover the expense of defending claims such as those that Pelletier brought against him. Pelletier and Schlanger are not entitled to "free" violations of Rule 11 because of Zweifel's prudence in investing in insurance coverage. Nor is it of any moment that Zweifel's insurance carrier has not been made a party in this appeal. Pelletier's and Schlanger's argument that Zweifel cannot recover what he may have to pay over to the insurance company in satisfaction of its subrogation rights is patently frivolous.

In sum, because Pelletier and Schlanger do not dispute that Zweifel's defense in the district court cost $282,837.96 in attorney's fees, litigation expenses,a nd court costs, there is no reason for further consideration of this matter in the district court. All that remains is the entry of judgment. Accordingly, we direct the district court, upon receipt of our mandate, toenter judgment forthwith for Gary D. Zweifel against Ronald O. Pelletier and Herbert P. Schlanger, jointly and severally, in the amount of $301,156.46 plus interest from April 10, 1991, the date the Pelletier I mandate issued.[5]

IT IS SO ORDERED.

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5. We note that on March 26, 1992, the district court enetered judgment for Zweifel against Pelletier and Schlanger, jointly and severally, in the sum of $43,318.50. That amount if made up of the fine, $25,000, the district court imposed against Pelletier and Schlanger under Fed. Civ. P. 11 and the double costs and attorney's fees, $18,318.50, we directed the court to enter under Fed. R. App. P. 38. For the reasons stated in this opinion, that judgment, to the extent it included the fine, was erroneously entered. We therefore direct the district court to vacate that judgment, noting that the portion representing the Fed. R. App. P. 38 relief will be included in the judgment to be netered pursuant to this mandate.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	
	:	CIVIL NO.
vs.	:	1:86-CV-156-ODE
	:	
GARY D. ZWEIFEL	:	

ORDER

On March 18, 1993, The United States Court of Appeals for the Eleventh Circuit issued its mandate in the instant action. Pursuant ot direction form the Eleventh Circuit, this court's entry of judgment on March 26, 1992 for Gary D. Zweifel against Ronald O. Pelletier and Herbert P. Schlanger, jointly and severally, in the amount of $43,318.50 is VACATED. In further accordance with the Eleventh Circuit's mandate, the clerk is DIRECTED to enter judgment for Gary D. Zweifel against Ronald O. Pelletier and Herbert P. Schlanger, jointly and severally, in the amount of $301,156.46 plus interest from April 10, 1991.

SO ORDERED, this _22_ day of March, 1993.

__/s/_____
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8630

RONALD O. PELLETIER.

Plaintiff-Appellee
Cross-Appellant

versus

GARY D. ZWEIFEL,

Defendant-Appellant
Cross-Appellee

(Filed MAY 14 1993)

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Cheif Judge, ANDERSON, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regualr active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court havingbeen polled at the request of oneof the members of the Court and a majorit of theCircuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service nothaving voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

__/s/ Illegible
UNITED STATES CIRCUIT JUDGE